Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — NO WA-21NCVC-48–06 OF 2016
ALIZA SULAIMAN JC
21 NOVEMBER 2018

Evidence — Expert evidence — Medical opinion — Defendants tendered reports of two serving government medical experts absolving defendants of any negligence in the death of plaintiff's wife during her admission to government hospital — Whether the experts contravened the Guideline of the Malaysian Medical Council 002/006: Medical Records and Medical Reports: Second and Expert Opinion which forbade them from giving expert opinion in the trial — Whether reports of experts were not independent but biased in favour of the government as their employer and other defendants as their colleagues — Whether the defendants by using reports of its in-house experts had attempted to unfairly influence the Bolam test for negligence

Tort — Negligence — Medical negligence — Doctors and nurses of government hospital admitted liability for negligently causing death of plaintiff's wife during her admission — Whether plaintiff had proven claim for aggravated damages against them

The plaintiff and his wife ('the deceased') were former high-ranking government officers who had retired from service. In the instant suit by the plaintiff against the Government of Malaysia and doctors and nurses of the Hospital Kuala Lumpur ('HKL') for damages for, inter alia, breach of contractual and other duties and negligence in causing the death of his wife ('the deceased') five days after her admission to the hospital, the defendants admitted liability. The trial proceeded to determine the quantum of damages payable to the plaintiff and the deceased's dependants. The deceased had initially sought treatment at a private hospital for severe pain and swelling in her right ankle. On being diagnosed as having septic arthritis of the ankle, the deceased decided to immediately have the condition treated at the HKL where she had once been Head of its Outpatient Department. The second defendant ('D2') — an orthopaedic surgeon — and the seventh defendant ('D7'), who attended to the deceased, felt that she was not having septic arthritis but only osteoarthritis. They took her off the antibiotics she had been given at the private hospital and gave her the drug Tramadol even though she had specifically said that she was allergic to it. D2 and D7 then went on their

weekend break. The deceased, who suffered from hypertension and diabetes, meanwhile began to have persistent vomiting and severe headache and by early the next day, could not even respond to questions put to her. Her son-in-law ('PW2'), a medical doctor, who visited her around noon, suspected that she had suffered septic shock, diabetic coma and a stroke and insisted immediate blood tests be done and that she be transferred to the intensive care unit ('ICU'). Subsequent tests and procedures confirmed that she not only had septic arthritis of the ankle joint but had also suffered a massive and fatal stroke. The plaintiff's case comprised the oral evidence of the plaintiff and PW2 and the medical reports of two independent experts both of whom opined that the defendants had been clearly negligent in the treatment and handling of the deceased. The defendants did not call any witnesses but relied upon the reports of two medical specialists, who were then in government service, absolving the defendants of any negligence. Besides two children from her marriage to the plaintiff, the deceased also left behind an elderly widowed mother whom she had been taking care of. Inter alia, the plaintiff claimed for RM1.25m against the defendants for aggravated damages on the ground that: blood tests were not done to rule out the possibility of septic arthritis, the deceased was given Tramadol against her instructions, the doctors and nurses did not monitor and promptly act on her worsening condition, her medical records had been tampered with late and false entries to indicate that she was well during her admission, PW2 was accused of having interfered with the deceased's treatment, D2 had taken an arrogant and unrepentant attitude insisting that his diagnosis of osteoarthritis was correct, and the defendants had used misused the reports of serving government medical experts to defeat the plaintiff's claim and unfairly influence the *Bolam* test for negligence.

Held, awarding the plaintiff RM500,000 in aggravated damages, RM140,000 in general damages (comprising RM100,000 for pain and suffering and loss of amenities suffered by the deceased, RM30,000 to the deceased's mother for loss of support/maintenance and RM10,000 for bereavement under the Civil Law Act 1956) and RM95,896.17 in special damages:

(1) The evidence showed that the defendants failed to follow up on the blood investigations and this led to a downhill spiral in the deceased's condition. The callous attitude of the attending doctors and nurses, particularly D2 and D7, in failing to ensure that an accurate and speedy diagnosis of the deceased's ailment was made was one of the aggravating factors which entitled the plaintiff to be compensated for the injury to his feelings (see para 81).

(2) The negligent act of administering tramadol to the deceased despite her history of intolerance to the drug caused the deceased to be disoriented and nauseous and to suffer prolonged retching on the night of her admission and the early hours of the next day. Adequate and proper observation of the deceased during that critical period in the ward was

lacking. The defendants attempted to place the blame on the deceased and her family members by making a late entry in the medical records which stated 'can try Tramal in the ward, family agreed to try'. This was insulting and contumelious behaviour which had increased the plaintiff's mental pain and suffering (see paras 82–83).

(3) D2's words and conduct during his meeting with the deceased's family members following her death were disturbing, appalling and an insult to his profession and to the plaintiff and his family. It was painfully cruel for the plaintiff and his family members who attended the meeting to hear such utterances from a professional medical doctor. There could be no clearer illustration of insulting conduct which justified an award for aggravated damages (see para 88).

(4) PW2's actions (ie to commence intravenous fluids, refer to the acute pain service, provide immediate resuscitative measures, make decisions on airway support and make plans for surgery under anaesthesia) were necessitated by the lackadaisical attitude of the doctors and nurses in the ward in relation to the deceased's deteriorating condition. It was completely understandable for PW2 to have undertaken the measures that he did, albeit it was too late to save the deceased. In the light of the defendants' own inaction and tardiness, it was reprehensible for them to accuse PW2 of unwarranted interference. The defendants' accusations against PW2 did nothing but fortify the plaintiff's case for aggravated damages (see paras 90 & 92).

(5) There was credible evidence to support the plaintiff's contentions that the deceased's medical records post-event were embellished. The defendants did not call any of the makers of the alleged late entries to challenge or provide any explanation regarding the same. Such despicable conduct enhanced the plaintiff's case for aggravated damages to be awarded (see para 95).

(6) The two reports submitted by the defendants' experts were notably silent on the late and inaccurate entries in the deceased's medical records and were skewed towards absolving the defendants of any liability whatsoever. The reality was that the defendants admitted liability on the first date fixed for trial. It thus appeared that the defendants' experts were merely in-house experts who were beholden to the first defendant as their employer and owed allegiance to the other defendants. In accepting the assignment to prepare the reports, the said experts acted contrary to the Guideline of the Malaysian Medical Council 002/006: Medical Records and Medical Reports where para 3 on Second and Expert Opinion explicitly stated that: 'A practitioner involved in the management of the patient or working in the same healthcare facility or Ministry as the doctor in the inquiry, should not appear as expert witness in such inquiry' (see paras 104–105).

(7) There was merit in the plaintiff's contention that the defendants attempted to misuse the *Bolam* test by getting its two in-house experts to conclude that there was no negligence and thereby require the plaintiff to show that the defendants' experts' opinions were not reasonable, responsible and respectable and did not stand up to a logical analysis. A responsible expert who understood his duties and obligations under the law would gather all the facts, consider the versions of both sides, address all issues which arose for determination and provide an objective and truly independent report uninfluenced by the surrounding pressures of the disputing litigants (see paras 102–103).

[Bahasa Malaysia summary

Plaintif dan isterinya ('si mati') adalah bekas pegawai kerajaan berpangkat tinggi yang telah bersara daripada perkhidmatan. Dalam tuntutan ini oleh plaintif terhadap Kerajaan Malaysia dan doktor dan jururawat Hospital Kuala Lumpur ('HKL') untuk ganti rugi, antara lain, pelanggaran kontrak dan tugas lain dan kecuaian dalam menyebabkan kematian isterinya ('si mati') lima hari selepas kemasukan ke hospital, defendan-defendan mengakui liabiliti. Perbicaraan diteruskan untuk menentukan kuantum ganti rugi yang perlu dibayar kepada plaintif dan tanggungan si mati. Si mati pada awalnya mendapatkan rawatan di sebuah hospital swasta untuk kesakitan teruk dan bengkak di pergelangan kaki kanannya. Setelah didiagnosis mempunyai arthritis septik pergelangan kaki, si mati memutuskan untuk segera mendapatkan rawatan di HKL di mana beliau pernah menjadi Ketua Jabatan Pesakit Luar. Defendan kedua ('D2') — seorang pakar bedah ortopedik — dan defendan ketujuh ('D7'), yang menangani si mati, merasakan bahawa beliau tidak mempunyai arthritis septik tetapi hanya osteoarthritis. Mereka mengambil antibiotik yang diberikan kepadanya di hospital swasta dan memberinya ubat Tramadol walaupun beliau secara khusus mengatakan bahawa beliau alah kepadanya. D2 dan D7 kemudiannya berehat pada hujung minggu. Sementara itu, si mati, yang menderita hipertensi dan diabetes, mula muntah berterusan dan sakit kepala yang teruk dan pada keesokan harinya, tidak dapat menjawab pertanyaan yang diberikan kepadanya. Anak menantunya ('PW2'), seorang doktor perubatan, yang melawatnya sekitar tengah hari, mengesyaki bahawa beliau telah mengalami kejutan septik, koma diabetik dan strok dan menegaskan ujian darah segera dilakukan dan beliau akan dipindahkan ke unit penjagaan intensif ('ICU'). Ujian dan prosedur seterusnya mengesahkan bahawa beliau bukan sahaja mempunyai arthritis septik sendi pergelangan kaki tetapi juga mengalami strok besar dan fatal. Kes plaintif terdiri daripada keterangan lisan plaintif dan PW2 dan laporan perubatan dari dua pakar bebas yang kedua-duanya berpendapat bahawa defendan telah jelas cuai dalam rawatan dan pengendalian si mati. Defendan-defendan tidak memanggil mana-mana saksi tetapi bergantung pada laporan dua pakar perubatan, yang pada masa itu berada dalam perkhidmatan kerajaan, melepaskan defendan-defendan dari apa-apa

kecuaian. Selain daripada dua anak dari perkahwinannya dengan plaintif, si mati turut meninggalkan seorang ibu janda tua yang dijaga oleh beliau. Antara lain, plaintif menuntut sebanyak RM1.25 juta terhadap defendan-defendan untuk ganti rugi teruk atas alasan bahawa: ujian darah tidak dilakukan untuk menolak kemungkinan arthritis septik, si mati diberikan Tramadol melawan arahan beliau, doktor dan jururawat tidak memantau dan dengan segera bertindak atas keadaannya yang semakin teruk, rekod perubatannya telah diusik dengan penyertaan lewat dan palsu untuk menunjukkan bahawa beliau baik semasa kemasukannya, PW2 dituduh telah mengganggu rawatan si mati, D2 telah mengambil sikap sombong dan tidak menyesal yang menegaskan bahawa diagnosis osteoarthritis adalah betul, dan defendan-defendan telah menggunakan penyalahgunaan laporan perkhidmatan pakar perubatan kerajaan untuk mengalahkan tuntutan plaintif dan secara tidak adil mempengaruhi ujian *Bolam* untuk kecuaian.

Diputuskan, mengawardkan plaintif RM500,000 sebagai ganti rugi teruk, RM140,000 sebagai ganti rugi am (terdiri daripada RM100,000 untuk kesakitan dan penderitaan dan kehilangan kemudahan hidup yang ditanggung oleh si mati, RM30,000 kepada ibu si mati untuk kehilangan sokongan/penyaraan dan RM10,000 untuk ganti rugi kehilangan di bawah Akta Undang-Undang Sivil 1956) dan RM95,896.17 untuk ganti rugi khas:

(1) Keterangan menunjukkan bahawa defendan-defendan gagal untuk membuat susulan pada penyiasatan darah dan ini membawa kepada penurunan keadaan si mati. Sikap tidak bertanggungjawab doktor dan jururawat, terutamanya D2 dan D7, dalam gagal memastikan diagnosis yang tepat dan cepat terhadap penyakit si mati itu adalah salah satu faktor pemberatan yang memberi hak kepada plaintif untuk diberi pampasan bagi kecederaan perasaannya (lihat perenggan 81).

(2) Tindakan cuai memberi Tramadol kepada si mati walaupun sejarahnya tidak bertoleransi terhadap dadah itu menyebabkan si mati menjadi pening dan mual dan mengalami penderitaan yang berpanjangan pada malam kemasukannya dan awal pagi hari berikutnya. Pemerhatian yang mencukupi dan betul terhadap si mati semasa tempoh kritikal di wad adalah tidak mencukupi. Defendan-defendan cuba menyalahkan si mati dan keluarganya dengan membuat entri lewat dalam rekod perubatan yang menyatakan 'boleh mencuba Tramal di wad, keluarga bersetuju untuk mencuba'. Ini adalah penghinaan dan perilaku yang melampau yang telah meningkatkan kesakitan dan penderitaan mental plaintif (lihat perenggan 82–83).

(3) Kata-kata dan kelakuan D2 semasa pertemuannya dengan ahli keluarga si mati setelah kematiannya mengganggu, mengerikan dan adalah satu penghinaan pada kerjayanya dan kepada plaintif dan keluarganya. Ia adalah sangat kejam untuk plaintif dan ahli keluarganya yang menghadiri

pertemuan itu untuk mendengar ucapan tersebut dari seorang doktor perubatan profesional. Tidak terdapat ilustrasi yang lebih jelas tentang kelakuan penghinaan yang membenarkan penghargaan untuk ganti rugi teruk (lihat perenggan 88).

(4) Tindakan PW2 (iaitu untuk memulakan cecair intravena, merujuk kepada perkhidmatan kesakitan akut, menyediakan langkah pemulihan segera, membuat keputusan mengenai sokongan saluran udara dan membuat rancangan untuk menjalani pembedahan di bawah anestesia) adalah diperlukan dengan sikap kekurangan doktor dan jururawat di wad berkaitan dengan keadaaan si mati yang semakin merosot. Adalah difahami sepenuhnya untuk PW2 telah melakukan langkah-langkah yang dilakukannya, walaupun sudah terlambat untuk menyelamatkan si mati. Oleh kerana tiada tindakan dan kelewatan defendan-defendan, adalah keji bagi mereka bagi menuduh PW2 untuk campurtangan yang tidak wajar. Tuduhan defendan-defendan terhadap PW2 tidak melakukan apa-apa tetapi memperkuat kes plaintif untuk ganti rugi teruk (lihat perenggan 90 & 92).

(5) Terdapat keterangan yang boleh dipercayai untuk menyokong pandangan plaintif bahawa rekod perubatan si mati selepas peristiwa itu telah diperelokkan. Defendan-defendan tidak memanggil mana-mana pembuat penyertaan lewat yang dikatakan untuk mencabar atau memberikan sebarang penjelasan mengenai perkara tersebut. Tingkah laku hina yang sedemikian meningkatkan kes plaintif untuk ganti rugi teruk untuk diawardkan (lihat perenggan 95).

(6) Kedua-dua laporan yang dikemukakan oleh pakar-pakar defendan-defendan adalah diam pada penyertaan lewat dan tidak tepat dalam rekod perubatan si mati dan telah condong ke arah melepaskan defendan apa-apa liabiliti. Kenyataannya adalah bahawa defendan-defendan mengakui liabiliti pada tarikh pertama yang ditetapkan untuk perbicaraan. Oleh itu kelihatan bahawa pakar-pakar defendan-defendan hanyalah pakar-pakar dalaman yang mewakili defendan pertama sebagai majikan mereka dan berhutang kesetiaan kepada defendan-defendan yang lain. Dalam menerima tugasan untuk menyediakan laporan itu, pakar-pakar tersebut bertindak bertentangan dengan Garis Panduan Majlis Perubatan Malaysia 002/006: Rekod Perubatan dan Laporan Perubatan di mana perenggan 3 pada Pendapat Kedua dan Pakar menyatakan secara terperinci bahawa: 'Seorang pengamal yang terlibat dalam pengurusan pesakit atau bekerja di kemudahan penjagaan kesihatan yang sama atau Kementerian sebagai doktor dalam siasatan tersebut, sepatutnya tidak hadir sebagai saksi pakar dalam siasatan sedemikian' (lihat perenggan 104–105).

(7) Terdapat merit dalam pandangan plaintif bahawa defendan-defendan cuba untuk menyalahgunakan ujian *Bolam* dengan mendapatkan dua

pakar dalamannya untuk menyimpulkan bahawa tiada kecuaian dan oleh itu memerlukan plaintif untuk menunjukkan bahawa pendapat pakar-pakar defendan-defendan tidak munasabah, bertanggungjawab dan dihormati dan tidak menimbulkan analisis logik. Seorang pakar yang bertanggungjawab yang memahami tugas dan kewajipannya di bawah undang-undang akan mengumpul semua fakta, mempertimbangkan versi kedua-dua belah pihak, menangani semua isu-isu yang timbul untuk penentuan dan memberikan laporan objektif dan benar-benar bebas yang tidak dipengaruhi oleh tekanan sekitar litigan yang bertikaian (lihat perenggan 103–102).]

Notes

For cases on medical negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1657–1676.

For cases on medical opinion, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2010–2012.

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 641; [2001] 8 CLJ 1, HC (refd)

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497, HC (refd)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771, HL (refd)

Cassell & Co Ltd v Broome and another [1972] AC 1027, HL (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors [2013] 10 MLJ 805, HC (refd)

Hariesh Kumar a/l Muthragi lwn Kerajaan Malaysia dan lain-lain [2011] MLJU 1533, HC (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

Jub'il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669; [2001] 4 CLJ 599, HC (refd)

Lee Yaw Long v Dr Ganapathi Pillai and Ors (Civil Suit No 22–299 of 2003) (unreported), HC (refd)

Liau Kim Lian v Bajuria [1971] 1 MLJ 276, FC (refd)

Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (refd)

Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal [2017] 1 MLJ 500; [2016] 1 LNS 1160, CA (refd)

Mohd Ridzwan bin Abdul Razak v Asmah Bt Hj Mohd Noor [2016] 4 MLJ 282, FC (refd)
Muhamad Haziq Amsyar & Anor v The Government of Malaysia (Civil Suit No M3-22–307 of 2003) (unreported), HC (refd)
Muhammad Yassien bin Zuliskandar (seorang kanak-kanak yang mendakwa melalui bapanya dan sahabat wakilnya Zuliskandar bin Md Pechor) & Ors v Kerajaan Malaysia [2010] MLJU 2163, HC (refd)
Neo Kim Soon (administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor [1995] 3 MLJ 435, CA (folld)
Nur Syarafina binti Sa'ari v Kerajaan Malaysia & Ors [2018] MLJU 1158, HC (refd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Positive Well Marketing Sdn Bhd v OKA Concrete Industries Sdn Bhd [2014] 10 MLJ 385; [2013] 7 CLJ 1083, HC (refd)
Richardson v Howie [2004] EWCA Civ 1127, CA (refd)
Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102; [2017] 3 CLJ 311, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Sheela Christina Nair d/o Mariadass v Regency Specialist Hospital Sdn Bhd & Ors [2016] MLJU 1899; [2016] 9 CLJ 267, HC (refd)
Thivya Ruban s/o Thyagarajan v Government of Malaysia (Suit No 21–170 of 2005) (unreported), HC (refd)
Thompson v Commissioner of Police of the Metropolis [1997] 2 All ER 762, CA (folld)
Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd [2003] 4 MLJ 30, HC (refd)
Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram [2009] 2 MLJ 473, FC (refd)
YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors [2016] 6 MLJ 352, CA (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438; [2017] 8 CLJ 605, FC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(1), (2), (3), (3A), (3B)(a), 8, 11
Rules of Court 2012 O 40A r 2, O 42 r 12, Form 117

Manmohan S Dhillon (Karthi Kanthabalan with him) (PS Ranjan & Co) for the plaintiff.
Nurhafizza Azizan (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Aliza Sulaiman JC:

'Diagnosis is not the end, but the beginning of practice'.

- Martin Henry Fischer

(1879–1962)

INTRODUCTION

[1] The plaintiff's wife, the late to' Puan Dr Suzanne Thomas ('the deceased') served the Government of Malaysia in the Medical and Health Services for 36 years. On Saturday, 20 December 2014, the deceased sought treatment at Tropicana Medical Centre ('TMC') for swelling and severe pain in her right ankle. The consultant orthopaedic surgeon at TMC diagnosed the deceased's condition as septic arthritis of her right ankle. The deceased then made the fateful decision of having her condition treated at Kuala Lumpur Hospital ('KLH') since she was a patient of KLH and all her medical records were there. In fact, the deceased had been the Head of the Outpatient Department of KLH at one point of time in her career. The deceased passed away at KLH on the night of Christmas Day in 2014.

[2] The plaintiff, who also had a distinguished career in the government, namely in the judicial and legal service, brought this claim against the defendants for breach of contractual and other duties as stated in the statement of claim ('SoC') and in negligence, including but not limited to a claim pursuant to ss 7 and 8 of the Civil Law Act 1956 (Act 67) ('the CLA 1956').

[3] On 5 April 2018, senior federal counsel ('SFC') representing the defendants, Nurhafizza Azizan informed the court that the defendants admit liability and therefore, judgment on liability was recorded on that date. Following the trial on quantum of damages, I had, on 6 August 2018 given an award for special damages, general damages including aggravated damages, costs and interest to be paid by the defendants to the plaintiff.

[4] Being dissatisfied, the defendants have appealed against my whole decision. Subsequently, the plaintiff has also lodged a cross-appeal against part of my decision for certain awards which are said to be insufficient.

[5] I now set out my full grounds of judgment for the award on quantum of damages.

BACKGROUND FACTS

[6] The salient background facts in this case can be discerned from the plaintiff's summary of case dated 18 January 2017 and the evidence before the court.

[7] The deceased was born on 11 November 1951. The plaintiff and the deceased were married on 21 April 1979 and there are two children of the marriage, John and Shara Ann who are in their thirties.

[8] At all times material to this action, the second to tenth defendants were doctors and the 11th to 13th defendants were nurses employed by the first defendant at KLH.

[9] The deceased was referred to KLH from TMC on Saturday, 20 December 2014 after a provisional diagnosis of septic arthritis was made by Dr Hisham Kunhimon, the consultant orthopaedic surgeon at TMC.

[10] On arrival at the Emergency Department of KLH on the same evening, the deceased was conscious and able to give her history herself. The deceased had informed the doctors on duty, including Medical Officer Dr Shukri bin Muhammad Safian ('seventh defendant'), that she had hypertension and diabetes in particular, and that her full medical records were with KLH. The deceased also related the fact that she was allergic to, or could not tolerate, certain drugs including Tramadol. She had explained the adverse consequences from Tramadol based on her previous experience in the same hospital some years earlier. Despite noting this history in the medical records, the deceased was given Tramadol that very same night.

[11] The doctors assigned to the deceased's case were orthopaedic surgeon, Mr Sivalingam s/o Raja Gopal ('second defendant') and the seventh defendant. These doctors decided to reject the diagnosis of septic arthritis and instead made a diagnosis of osteoarthritis. The unfolding of events would subsequently show that this decision proved to be fatal to the deceased.

[12] Having made a diagnosis of osteoarthritis, the KLH doctors had also decided to undertake fresh blood investigations. However, it was later

A discovered that the blood sample taken at KLH had clotted and as a result could not be used for investigating the deceased's blood parameters. Unfortunately, there was no follow-up and thus, the need to rule out septic arthritis was somehow forgotten and/or ignored.

B **[13]** In addition, the seventh defendant had refused the plaintiff's request to cover the deceased with antibiotics while KLH was undertaking their own investigation.

C **[14]** The second and seventh defendants then went for their weekend break and left the deceased in the care of the ward nurses. The deceased's sister, Dr Annie Thomas stayed by the deceased's bedside during the early hours of Sunday, 21 December 2014 which saw the deceased going through an episode of persistent vomiting and severe headache. It was not until around 6am that D doctors checked on the deceased's condition. That morning, doctors from the acute pain service and ENT asked the plaintiff about the deceased's medical history since the deceased was not in a state to respond to the doctors' questions.

E **[15]** The deceased's son-in-law, Dr Abraham Philips arrived at KLH around noon on 21 December 2014 and upon seeing the deceased and being briefed about what transpired earlier, he suspected that the deceased was unconscious. Upon further examination, Dr Abraham ascertained that the deceased had slipped into a comatose state, likely due to several reasons such as a raging F untreated infection, diabetic coma and/or a stroke. As time was of the essence, Dr Abraham proceeded to initiate resuscitative care which included taking necessary blood investigations to confirm his suspicion of septic shock with diabetic ketoacidosis and requested that the deceased be referred to the G physician and intensive care unit ('ICU') specialist on call.

[16] After discussions with the physician, it was agreed that a CT scan of the deceased's brain would be carried out to rule out a stroke. However, by then, the deceased began to choke and she was wheeled into the operating theatre H where a needle aspiration of the deceased's ankle joint was carried out. Pus was found in the ankle joint which confirmed the diagnosis of septic arthritis. The arthrotomy and washout was performed under general anaesthesia.

I **[17]** Thereafter, the deceased was admitted to the ICU. Her condition continued to deteriorate whereby on Tuesday, 23 December 2014, the neurologists broke the news feared by any family member that the deceased had suffered a massive stroke to her cerebellum and she had at most, only ten days to live. The deceased passed away at 11.05pm on Thursday, 25 December 2014.

LIABILITY

[18] The plaintiff's claim against the defendants and each of them and their servants and agents is for negligence and for breach of contractual and other duties, as a result of which the deceased suffered injuries and endured pain and suffering and loss of the amenities of life and then died, causing or materially contributing to loss and damage suffered by the deceased, her estate, and her dependants. It is the plaintiff's case that, inter alia, the defendants had made late and erroneous entries in the medical records as an attempt to cover up for their misjudgements.

[19] The principal thrust of the plaintiff's allegations against the defendants and each of them are that there was a failure to:

(a) take into account and/or act on the information disclosed by TMC and the deceased;

(b) undertake proper monitoring, observation and investigation of the deceased's condition;

(c) correctly diagnose the deceased's condition accurately and in a timely manner;

(d) undertake proper treatment of the deceased's condition;

(e) provide the deceased with proper resuscitation and ventilatory support;

(f) obtain proper specialist and/or multi-disciplinary support in managing the deceased's condition; and

(g) have in place proper and efficient systems for the safe management of the deceased's condition, or in the alternative, failed to follow such systems.

[20] As mentioned at the outset, on the first day of trial, learned SFC informed the court that the defendants were admitting liability. Judgment on liability was then duly recorded against the defendants.

TRIAL ON ASSESSMENT OF DAMAGES

[21] The trial was held on 23 May 2018 where the plaintiff ('PW1') and Dr Abraham ('PW2') gave evidence for the plaintiff. The defendants did not call any witnesses.

[22] I heard oral submissions by learned counsel for the plaintiff and SFC on 21 June 2018 and sought clarification on three matters which pertain to the issues on the cost of obtaining medical records; costs for the funeral expenses and memorial services; and any further Malaysian authorities on aggravated damages in medical negligence apart from *Dr Hari Krishnan & Anor v Megat*

Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281 and *Nur Syarafina binti Sa'ari v Kerajaan Malaysia & Ors* [2018] MLJU 1158 on 11 July 2018. Additional written submissions were filed by counsels for both parties and decision on quantum of damages was delivered on 6 August 2018.

ANALYSIS AND FINDING ON QUANTUM OF DAMAGES

[23] In assessing damages, this court is mindful that damages serve as a compensation and are not meant to reward the claimant nor punish the wrongdoer. The damages must be fair, adequate and not excessive based on cogent evidence before the court that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of such act, so far as money can compensate (see *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292; *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885).

[24] By virtue of para 11 of the SoC, the plaintiff claims compensation under ss 7 and 8 of the CLA 1956 by reason of the deceased's death. In addition, the plaintiff is claiming for the benefit of himself, his children and his mother-in-law, Mrs Kunjamma Thomas d/o NM Mathai.

A. Special Damages

[25] It is trite law that special damages must be pleaded and particularised and must be proved by either oral or documentary evidence (see *Jub'il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 669; [2001] 4 CLJ 599; *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641; [2001] 8 CLJ 1 and *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2015] 1 CLJ 825).

(i) Hospital and medical expenses

[26] In the SoC, a sum of RM1,200 was pleaded for hospital and medical expenses. However, in PW1's witness statement, reference was made to the official receipt and tax invoice issued by TMC for the amount of RM1,410.60 (refer to pp 574–577 *Ikatan Dokumen-Dokumen Bersama (Bahagian B) — Jld 2* marked as 'B1') which PW1 testified as being the correct figure.

[27] No award is given for this item as it relates to the expenses incurred when the deceased sought treatment at TMC. The deceased herself chose to be treated at a public hospital over a private one. The expenses claimed was before

the deceased sought treatment at, and was admitted into, KLH and thus, there is no valid reason for the defendants to bear this amount.

(ii) Travelling expenses

[28] The plaintiff sought a sum of RM2,000 for the travelling expenses of members of the family of the deceased to and from HKL. PW1's explanation on this aspect (which is also applicable in respect of the amount claimed for travelling and accommodation expenses of family members for the funeral and memorial services in sub-para (vi) below) are in the following words:

> I had family members and friends coming from various parts of the country, Singapore and Australia. The RM2,000 claimed was a rough amount of money I had given out to some or two of them who flew in and out of KL from Terengganu and who could not have afforded the cost. All others met their own expenses including for hotel and meal expenses. This amount was incurred by me.
>
> This amount claimed does not include the cost of the travelling costs, accommodation and meals of other members of the family especially those from Singapore and Australia. It also does not include the travelling expenses incurred several times a day for me and family members from my home in Tropicana to the Hospital KL each day.

[29] During cross-examination, this is what PW1 had to say:

> Well, I didn't make a record or I didn't keep a record of who spent what in coming but this is about the money that I personally paid out for the travel of some of them who came but I didn't ask them to give me their bill for their travelling expenses of their accommodation.
>
> ...
>
> As I said , I didn't keep any documents, not at that time when I was or the family was bereaving and for me to ask for travel documents and receipts and so on. I mean, this is very low sum of money that I thought that I should claim but the amount of money I would have spent for this would have been much, much more than that.

[30] Learned SFC relied on the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 to support her submission that no documentary evidence had been produced to support the plaintiff's claim and as such, no award should be made for this item.

[31] In their written submissions, learned counsels for the plaintiff cited the Court of Appeal judgment in *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311 and the judgment of the High Court in *Nurul Husna* for the proposition that 'special damages, so long as they were pleaded and particularised, could be

proved by oral or documentary evidence. Such claims were to be allowed so long as they were within a reasonable sum and justifiable in the circumstances'.

[32] In this regard, I am of the view that oral evidence given by PW1 and PW2 is sufficient as proof that they, together with PW1's daughter, son and sister-in-law had travelled from their respective residences to the hospital and back during the period of the deceased's hospitalisation from 20–25 December 2014.

[33] I took into account the distance from the residences of PW1 and PW2, namely Tropicana Golf & Country Resort (approximately 40 km for a two way trip) and from the Hartamas area (approximately 16km for a two way trip), respectively, to KLH and mileage at 70 cents per km. I gave allowance for different family members to make around six trips to and from HKL each day during the deceased's hospitalisation and concluded that RM1,000 is a reasonable sum to be awarded for travelling expenses.

(iii) Value of care given by family members while the deceased was in the hospital

[34] The plaintiff pleaded RM5,000 for this item whilst learned SFC submitted that only RM500 as nominal damages should be awarded.

[35] In his witness statement, PW1 said:

> The amount of RM5,000-00 claimed is a fraction value of earning time lost by me alone as a senior lawyer for the five days that my wife was in the hospital. My children, my son in law and my sister in law who are all professionals were with my wife at the hospital round the clock. The value of our care is not really quantifiable in dollars and cents.

[36] I agree with the plaintiff that the assessment of the value of care cannot be calculated with precision by applying a mathematical formula. As such, the court has a duty to consider and weigh all evidence in arriving at a decision as to what would be fair and adequate compensation in the circumstances of the case as a whole.

[37] Based on the evidence before this court, PW1, PW2 and PW1's children and sister-in-law were at HKL to provide the much needed care and support to the deceased. However, it is noted that by the evening of 21 December 2014, the deceased was placed in the ICU and hence, the main caregivers from that point onwards would be the doctors and nurses on duty to provide treatment to the deceased. Therefore, the court is of the view that RM1,000 is a fair and reasonable amount to be awarded for this item.

(iv) Funeral and prayer expenses

[38] The total amount of the receipts produced at pp 580–590 *Ikatan Dokumen-Dokumen Bersama (Bahagian B) — Jld 2* is RM55,728.20. Learned SFC submitted a total sum of RM30,000 be awarded for this item. Since the plaintiff was able to provide documentary evidence in relation to the claim for funeral and prayer expenses, there is no justification for the court to award anything less than what has been pleaded in the SoC. Hence, the sum of RM52,528 is allowed in full.

(v) Expenses for memorial service

[39] A sum of RM18,657.37 was pleaded for this item in the SoC. PW1 gave evidence that he paid this amount and that it is supported by bills and receipts. Apart from these main expenses, PW1 stated that there were many miscellaneous expenses including transport and love gifts to individuals which were not claimed.

[40] Despite PW1's testimony, the total amount of the receipts at pp 591–598 *Ikatan Dokumen-Dokumen Bersama (Bahagian B) — Jld 2* is RM4,068.17 (excluding the customary payments as appreciation based on PW1's letters dated 1 December 2015 to the recipients). It is the learned SFC's contention that this is the sum of money that should be awarded.

[41] In this regard, my finding leans in favor of the defendants since this is a case where, in light of the evidence given on the events that occurred at HKL during the deceased's hospitalisation, PW1 could foresee that a civil suit would be filed for negligence (refer in particular to the discussion on the 'Insulting remark by the second defendant' in paras 84–89 of this judgment). This is in contrast to the situation faced by the parents in *Nurul Husna*'s case whereby Vazeer Alam Mydin Meera JC (as His Lordship then was) had explained the reason as to why it would be unrealistic to expect Nurul Husna's parents to have copies of bills and receipts for all the expenses incurred in the following words:

> [40] I allowed the sum of RM44,500 as claimed by the plaintiffs as the amount claimed is not farfetched in today's prices and it would be too much to expect Nurul Husna's parents to keep documentary proof of expenses incurred for these expenses since her birth. In this regard, I accept the submissions of counsel for the plaintiffs that the evidence was clear that the irreversible injuries and disabilities suffered by Nurul Husna had and continue to have an overwhelming and debilitating effect on her parents and carers. Their resources were centred on first saving her life and next caring for her. In such circumstances it is unreasonable to expect Nurul Husna's parents to collect bills and receipts and filing them away with a view to bringing a claim especially when the defendants had hidden their culpability in the treatment and management provided to Nurul Husna (see *Overseas Investment Pte Ltd v*

Anthony Willian O'Brien & Anor [1988] 3 MLJ 332; [1988] 2 CLJ 238; [1988] 2 CLJ Rep 82). Indeed, if the defendants had candidly acknowledged their negligence earlier, than Nurul Husna's parents could have taken legal advice much earlier and kept copies of their bills and receipts to support their claim ...

[42] Unlike the parents in *Nurul Husna*'s case, PW1 has vast knowledge and experience and not to mention, an illustrious career which brought him to the top echelon of the Attorney General's Chambers. PW1 must surely be aware of the need to retain, collect and file all the necessary bills, invoices, receipts and other documents to prove his claim for special damages. In view of the failure to produce all the relevant bills and receipts to substantiate the claim for RM18,657.37, this court is constrained to award an amount of RM4,068.17 only.

(vi) Travelling and accommodation expenses of family members for the funeral on 28 December 2014 and the memorial services on 14 November 2015

[43] An amount of RM4,500 is claimed for this item but no documentary evidence relating to these expenses, especially for those traveling by airplane and for accommodation were produced. Learned SFC's submission as regards sub-para (ii) above on travelling expenses is equally applicable here.

[44] I did not give consideration to the alleged expenses incurred in flying some of PW1's family members and friends to Kuala Lumpur for the same reason as explained in sub-para (v) above.

[45] From PW1s evidence during cross-examination, it appears that he has taken it upon himself to reimburse the traveling and accommodation expenses for some family members who attended the funeral and memorial services. No further details were given as to the identity of these family members, where they had travelled from and which accommodation they had stayed in since, as PW1 had said, the amount claimed is very low and it did not occur to him to ask for receipts and other documentary proof from his relatives at that time when the family was bereaving.

[46] In view of the vague oral testimony and lack of documentary evidence pertaining to this claim, the award is limited to the costs expended for family members, at least around Kuala Lumpur, to travel for the funeral and the memorial services. To this end, a sum of RM2,000 which the court considers as reasonable is thus awarded.

(vii) Loss of contribution by the deceased to her mother for her livelihood, medical care, nutritional supplements, and travel expenses and still continuing

[47] The plaintiff pleaded an amount of RM7,500 and still continuing in the SoC. At the point of trial, learned counsels for the plaintiff submitted that RM15,000 for special damages for this item, and still continuing, should be awarded. Furthermore, learned counsels decided not to call the deceased's mother, Mrs Kunjamma to the witness stand although she was present in court on the day of trial.

[48] As such, the court was left with PW1's evidence which is as follows:

> My late wife's mother Mrs Kunjamma Thomas has lost her dependency on her daughter for all the above items including her pocket money, clothings and personal effects. Her free medical treatment including hospital admission in the Government hospital which she enjoyed as a dependant of a government medical officer, were lost. All those needs of hers had fallen on me since the demise of my wife.
>
> Mrs Kunjamma Thomas is presently 89 years old and 86 at the time of my wife's death. She has been living with us in our home since about 1997 and was totally dependent on my wife and I for all her needs and expenses. My wife was also giving her RM300-00 each month for her personal use. Since my wife's death, my mother in law needed to buy her own clothes and personal effects and I therefore gave her an increased amount of RM500-00 each month. Later when she failed to get free medical treatment on account of the loss of her daughter as a Government servant, I had to increase the amount to RM1,000 each month to cover some of her medical expenses. That amount of payment commenced about a year ago and is continuing without fail. Consequently the amount of RM7,500 as claimed 'and continuing', is no longer applicable and need to be reviewed and amended.
>
> The above said RM1,000 per month cash payment to Mrs Thomas does not include the cost of a domestic helper to care for her meals, laundry bedding and all others care and comforts. The figure also does not include the cost of her meals and beverages, her travelling expenses to go to church, visit doctors and visit her friends all of which would have been undertaken by her daughter but for her untimely death at the hands of the hospital KL. These costs are only likely to increase as she becomes older.

[49] In sum, all of Mrs Kunjamma's needs has fallen on PW1 since his wife's demise whereby he has given her RM500 a month for her personal needs. Around one year before the date of the witness statement (23 May 2018), that amount was increased to RM1,000 a month to cover some of Mrs Kunjamma's medical expenses as she could no longer obtain free medical treatment at government hospitals with the passing away of her daughter.

[50] The defendants argued that no award should be given for this item because there is no supporting evidence whatsoever and PW1's testimony amounts to hearsay evidence.

[51] In my view, there is basis for this claim based on PW1's evidence that he has provided Mrs Kunjamma's RM500 a month from January 2015–April 2017 and RM1,000 a month from May 2017 until August 2018. With due respect to Mrs Kunjamma's and her family members, in light of Mrs Kunjamma's age and no evidence being produced before this court as to her health condition and the exact nature of the medical treatments she requires, it is not possible to have an estimation of her life expectancy. Under the circumstances, an award could not be made on a continuing basis.

[52] Therefore, the claim is allowed from the month following December 2014, when the deceased passed away, until the month of August 2018, when decision was delivered, based on the following calculation:

RM500 x 28 months = RM14,000.00

(January 2015 until April 2017); and

RM1,000 x 16 months = RM16,000.00

(May 2017 until August 2018)

Total award = RM30,000.00

(viii) Cost of obtaining letters of administration

[53] According to PW1, the solicitors have not billed him for this amount because they are in the process of obtaining a distribution order from the courts.

[54] The learned SFC submitted that no award should be made since the amount is a mere estimate and not supported by any documents.

[55] It is my considered opinion that RM5,000 claimed is a fair estimate of the solicitor-client costs to obtain the letters of administration and thus an award for such amount is made.

(ix) Cost of obtaining medical records

[56] The SoC which is dated 31 May 2016 and filed on 3 June 2016 states that RM7,950 is claimed as *costs of obtaining medical records*. Subsequently, Messrs PS Ranjan & Co issued a tax invoice dated 12 April 2018 (see *Ikatan Dokumen Tambahan Plaintif* marked as 'C') to PW1 for RM7,950 as

professional charges for work done in obtaining copies of the medical records in relation to Originating Summons No 24NCVC-358–03 of 2015 ('OS') and there is a rubber stamp indicating that this amount has been paid on 17 April 2018.

[57] In his witness statement, PW1's answer to the final question No 46 is that the amount of RM7,950 would have been incurred by his advocates and solicitors on his behalf and he would have to reimburse them on it.

[58] The additional submissions filed by the plaintiff following the clarification session enlightened this court on the background to the OS. It appears that the plaintiff had requested for the medical records kept at HKL but the defendants refused to disclose the same. The plaintiff then filed the OS for discovery of those medical records.

[59] The Government of Malaysia did not resist the OS and consent judgment was entered on 23 April 2015 (see pp 26–28 *Ikatan Dokumen-Dokumen Tambahan Bersama* marked as 'B2') in, inter alia, the following terms:

> ...
>
> (3) Plaintif membayar perbelanjaan pemprosesan dan pentadbiran sebanyak RM300 kepada Defendan Pertama; dan
>
> (4) tiada perintah berkenaan kos permohonan ini ...

[60] In addition, a bill of costs in Form 117 of the Rules of Court 2012 ('RoC 2012') was enclosed as Annexure 2 to the written submission by the plaintiff's counsel dated 12 June 2018 and under the heading '*Perbelanjaan hangus/sendiri*', item 3.1 is stated as '*fi Rekod Perubatan*' and the amount of RM7,950 appears alongside it.

[61] In light of the consent judgment recorded for the OS, I agree with the submissions by learned SFC that the amount of RM7,950 cannot now be claimed as costs of obtaining medical records in this civil action when in fact, the cost was only RM300. The invoice issued by the plaintiff's counsel shows RM7,950 as professional charges and yet in the bill of costs prepared, the very same amount appears as one of the out-of-pocket expenses. To my mind, RM300 as costs of obtaining medical records should be reflected in the bill of costs as an item under the out-of-pocket expenses.

B. General damages

(i) Statutory bereavement

[62] Subsection 7(3A) and para 7(3B)(a) of the CLA 1956 provide as follows:

> (3A) An action under this section may consist of or include a claim for damages for bereavement and, subject to subsection (3D), the sum to be awarded as damages under this subsection shall be ten thousand ringgit.
>
> (3B) A claim for damages for bereavement shall only be for the benefit —
>
> (a) of the spouse of the person deceased; ...

[63] The defendants acknowledge that the plaintiff is entitled to a sum of RM10,000 for statutory bereavement on the basis of the above statutory provisions.

(ii) Maintenance of mother

[64] Before I proceed further, for present purposes, it is necessary for me at the outset to refer to the relevant words of sub-ss 7(1), (2) and (3) of the CLA 1956 as follows:

> 7 Compensation to the family of a person for loss occasioned by his death
>
> (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].
>
> (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
>
> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect for default of the party liable under subsection (1):
>
> Provided that —
>
> ...

(iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife; ...

[65] The plaintiff's counsels submitted that RM60,000 would be an appropriate award as general damages for the maintenance of Mrs Kunjamma for five years. The evidence in support of this claim is as per PW1's testimony quoted in relation to the claim for special damages — loss of contribution by the deceased to her mother.

[66] In their submissions, learned counsels for the plaintiff emphasised the deceased's role as a dutiful daughter who provided a home for Mrs Kunjamma and attended to all her personal and medical needs as an elderly widowed mother. Reliance was placed on the judgment of the Court of Appeal in *Neo Kim Soon (administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435 which had elucidated the provision of sub-s 7(3) of the CLA 1956 which was introduced by Act A602 of 1984 in the following words:

Here, the plaintiff was making the claim both for himself and for his son. He was not claiming for the equivalent monetary value of the services provided by the deceased but the actual monetary expense he had paid to the housekeeper and would have to continue to pay the housekeeper to look after this boy for 11 1/2 years from the date of the accident.

We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So fas as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.

It is different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

We say this because s 7(3) as it is presently worded not only empowers the court to compensate the claimant for any 'loss of support' but also for 'any reasonable expenses incurred as a result of the wrongful act'. We cannot agree with the respondents' counsel that the word 'together' in s 7(3) must be read to mean that unless monetary loss is first shown by way of loss of support, the claim for reasonable expenses cannot be sustained.

...

Although s 7(1) and (2) refer to the action by the personal representative as a representative action brought for the benefit of the relevant individuals, s 7(3) has clearly enlarged the scope of the damages which may be awarded by allowing recovery in the same action all quantifiable loss directly caused by the wrongdoer

and suffered by the persons for whose benefit the action has been brought. The presense of proviso (ii) which specially makes funeral expenses also recoverable in the same action reinforces this view.

[67] Thus, applying the case of *Neo Kim Soon* to the facts of the case before me, it was contended that this court is empowered to compensate Mrs Kunjamma for reasonable expenses incurred and is likely to incur for her care and maintenance as a direct result of the defendant's negligence.

[68] On the other hand, the defendants did not specifically submit on this issue and instead had responded by way of a global submission in suggesting that a nominal award of RM50,000 should be made for general damages and aggravated damages.

[69] Taking into account PW1's testimony and the lack of evidence to proof Mrs Kunjamma's life expectancy as opined above as well as the fact that at the time when my decision was delivered, a period of three years and sevenmonths had passed since the untimely demise of the deceased, it is my considered view that an award of RM30,000 is reasonable and fair for the loss suffered by Mrs Kunjamma as a direct result of the defendants' wrongful acts as pleaded in the SoC.

(iii) Pain and suffering and loss of amenities of life

[70] The fact that the deceased had to endure considerable pain and suffering during her hospitalisation at HKL cannot be denied in view of the defendants' admission of liability. Subparagraphs 10.28–10.46 in the SoC lists the particulars of injuries suffered by the deceased before her death and this includes respiratory distress, unrelieved right ankle pain, delirium, nausea, vomiting, impaired consciousness and loss of consciousness, convulsions, hypoxia, brain infarct, hyerglycaemia and microcirculatory imbalance. Some aspects of these injuries will be expanded in my analysis below on the assessment of aggravated damages.

[71] The plaintiff submitted that there are no comparable precedents for damages for pain and suffering and loss of amenities of life as what had come to pass in this case. I am in agreement with the plaintiff. To award a nominal sum of RM50,000 for general damages as proposed by the defendants would be an affront to the plaintiff in light of the agonising last few days of her life and to the deceased's immediate family members, relatives and close friends who had loved and cherished her. Hence, in my view, an award of RM100,000 as submitted by the plaintiff is apt and befitting.

(iv) Aggravated damages

[72] The authoritative analysis on aggravated damages is, of course, the judgment of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 where His Lordship held that aggravated awards were appropriate where the manner in which the wrong was committed was such as to injure the plaintiff's proper feelings of pride and dignity, or gave rise to humiliation, distress, insult or pain. Conduct which was offensive or accompanied by malevolence, spite, malice, insolence or arrogance could lead to recoverable intangible loss. Subsequently, the House of Lords in *Cassell & Co Ltd v Broome and another* [1972] AC 1027 referred to mental distress, injury to feelings, indignity, humiliation and a heightened sense of injury or grievance as a basis for an award for aggravated damages. The general pre-conditions of availability for such an award are exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong, or in certain circumstances, subsequent to the wrong; and mental distress sustained by the plaintiff as a result (see *The Law Commission Report on 16 December 1997, Item 2 of the Sixth Programme of Law Reform: Damages — Aggravated, Exemplary And Restitutionary Damages, Part II — Aggravated Damages*).

[73] The plaintiff prays for aggravated damages in the amount of RM1.25m be awarded on the authority that the Federal Court in *Dr Hari Krishnan* had decided that such damages can be awarded in medical negligence cases and the contention that the aggravating factors in the present case are far more serious than those in *Dr Hari Krishnan*. The Chief Justice of Malaysia, Raus Sharif (as His Lordship then was) in delivering the judgment of the court held as follows:

> [98] Aggravated damages have in fact been awarded as a separate head of damages by Malaysian courts. In the recent decision of this court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, the High Court's award of aggravated damages was upheld. This court held that:
>
> > In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor (*Rookes v Barnard* [1964] AC 1129 (HL) at pp 1121–1123; *W v Meah* [1986] 1 All ER 935). As an analogy, in *Appleton v Garrett* [1996] PIQR P 1 aggravated damages were given to patients of a dentist for injury to feelings, mental distress, anger and indignation upon learning that much of the dental treatment given to them was unnecessary and to a large extent performed on healthy teeth. The dentist had deliberately and in bad faith concealed from them the true condition of their teeth so that he could carry out dental work for profit ...
> >
> > In the circumstances of this case it was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment.
>
> [99] It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages

A are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damages from medical negligence cases, which involve real injury to person's body ...

B **[74]** The Federal Court thus decided the second question of law posed to the court ie 'Whether aggravating factors should be compensated for as general damages, therefore rendering a separate award of aggravated damages unnecessary, as decided by the English Court of Appeal in *Richardson v Howie* [2004] EWCA Civ 1127 and explained in *Michael Jones' Medical Negligence* (4th Ed 2008) para 12–011 in the negative.

C **[75]** Learned counsels for the plaintiff had summarised the aggravating factors in their written submissions as follows:

D (a) the refusal to accept Dr Hisham Kunhimon's diagnosis of septic arthritis;

(b) the refusal to accept blood investigation results from a private accredited hospital;

E (c) the failure to follow up on the blood investigations ordered by KLH;

(d) the prescribing of the contra-indicated drug Tramadol against patient's own specific instruction;

(e) the late and false entry in the medical records saying that the deceased and her family had agreed to try Tramadol;

F (f) the failure to observe the deceased's condition and to act on it;

(g) the inaccurate entries in the medical records suggesting that the deceased was well;

G (h) the squeezed-in and erroneous and inaccurate late entries in the medical records;

(i) the failure to have doctors to treat her when she was slowly slipping away in the midst of retching and severe distress with headache;

H (j) the unfounded allegation that PW2 had interfered with the deceased's treatment;

(k) the cruel and insulting remark made by the second defendant that he would have done the same all over again after having known that his diagnosis was proven reckless and fatal;

I (l) the misuse of in-house experts to try to defeat the plaintiff's claim; and

(m) the misuse of the *Bolam* test.

[76] With reference to the summary of aggravating factors, I find that there is evidence to support the factors as stated in sub-paras 75(c)–(m) above for the reasons given below.

(v) Blood investigations and failure in immediate treatment

[77] The plaintiff led evidence that the second and seventh defendants had decided to reject the blood investigation results from TMC which indicated that the deceased was suffering from an infection on the ground that HKL cannot rely on test done by a private hospital to commence treatment. During further cross-examination by learned SFC, PW1 stated that it is reasonable for HKL to do their own diagnosis. I pause here to note that this is a fair and honest answer by PW1 to which I would also agree. It would have been negligent on the part of the attending doctors if they had merely accepted Dr Hisham Kunhimon's diagnosis of septic arthritis and TMC's blood investigation results without conducting their own blood test.

[78] However, the evidence by PW1 and PW2 also show that:

(a) the deceased was taken off the antibiotics that she had been on in the past two days prior to her admission to HKL and was thus not protected;

(b) the blood sample taken at the Emergency Department, KLH had clotted and as a result could not be used for investigating the deceased's blood parameters. The staff nurse on duty in the ward then requested for the doctor on call to repeat the blood sample only on the morning of 21 December 2014; and

(c) the second and seventh defendants failed to follow-up on the blood investigations and the need to rule out septic arthritis and provide urgent treatment was forgotten and/or ignored as both doctors left for their weekend break.

[79] Among the long list of authorities prepared by learned counsels for the plaintiff in their bundles is *Butterworths Medical Dictionary* (2nd Ed, Butterworths & Co (Publishers) Ltd, 1978) which provide the meaning of 'septic arthritis' as 'A pyogenic infection of a joint cavity' while 'osteo-arthritis' is described as 'osteo-arthrosis. Chronic arthritis of a degenerative type, usually but not invariably associated with increasing age. It is not accompanied by a generalised constitutional disorder and affects particularly the hips, spine, ...'.

[80] PW2 had also elaborated on the difference between the two diagnoses in the following words:

15. Q: What was recorded in the medical records regarding any diagnosis?

A: 1. Acute exacerbation of bilateral ankle Osteoarthritis

2. To rule out/to exclude right ankle septic arthritis

...

19. Q: What is the difference, if any, between such diagnoses?

A: Septic arthritis is an Orthopedic emergency which requires a simple aspiration of the joint with a needle to confirm diagnosis. Subsequent surgery to clean out the joint together with prompt and early antibiotics are life-saving measures. Without these measures, the patient will suffer from cartilage destruction, septicemia and death.

Osteoarthritis is a less severe diagnosis which plan of management includes pain relief and improvement of joint function.

20. Q: How did the diagnosis of osteoarthritis affect the patient?

A: The erroneous diagnosis of Osteoarthritis left my mother-in-law's infection untreated which caused her condition to deteriorate into Septic Shock, Diabetic Coma as well as a massive stroke.

[81] The defendants did not call any witnesses at the trial and hence, I am satisfied that based on the evidence adduced by the plaintiff, there was indeed a failure on the part of the defendants to follow up on the blood investigations and this led to a downhill spiral in the deceased's condition. The callous attitude of the attendant doctors and nurses, particularly the second and seventh defendants, in failing to ensure that an accurate and speedy diagnosis of the deceased's ailment was made is one of the aggravating factors which entitles the plaintiff to be compensated for the injury to his feelings.

(vi) Prescribing tramadol

[82] The plaintiff had produced sufficient evidence to prove that the doctors at HKL had prescribed tramadol to the deceased despite explicitly noting her history of intolerance to the drug (see pp 0262, 0265 and 0275 of the medical records). This negligent act caused the deceased to be disoriented, nauseous and have prolonged retching on the night of 20 December 2014 and the early hours of 21 December 2014.

[83] Sadly, adequate and proper observation of the deceased during that critical period in the ward was lacking, and worse, the defendants attempted to place the blame on the deceased and her family members by making a late entry in the medical records that 'can try Tramal in the ward, family agreed to try'. To my mind, this is undoubtedly insulting and contumelious behavior on the part of the defendants which had increased the plaintiff's mental pain and suffering.

(vii) Insulting remark by the second defendant: 'I will do the same all over again'

[84] In order to appreciate the context of the words uttered by the second defendant, it is necessary for me to quote the relevant excerpts from the witness statements by PW1 and PW2, which for PW1, was repeated during the additional examination-in-chief and not challenged during the cross-examination.

[85] The following is PW1's statement:

21. Q: Did you accept Dr Sivalingam's explanation?

A: No, I did not accept his explanation that he was not at fault in any way for the death of my wife.

22. Q: Why did you not accept his explanation?

A: When I met him in the family conference, I could not accept his insistence that he was right in not covering my late wife's condition with antibiotics seeing that there was before him a serious diagnosis given by the Orthopedic consultant from the Tropicana Medical Centre. Both he and the Medical Officer who saw her at the A&E were adamant that the diagnosis was wrong. He could not explain why he did not check on the results of the blood test taken from Suzanne at the A&E Department before her admission. He defiantly rejected my argument that he had the blood results from the laboratory of another accredited hospital which was sufficient for him to do any emergency procedure to prevent deterioration in her health condition. He was egoistic to maintain that he knew what he was doing with my wife. He refused to answer why there was no doctor present to monitor her condition having regard that he had ordered to give her the pain medication called Tramadol which Suzanne had specifically informed the Medical Officer that she was highly intolerant to and that she was not to be given that medication. He had no answer when it was said to him that she started vomiting after Tramadol was administered to her. My son-in-law Dr Abraham questioned him many times over about his failure to follow or to adopt basic medical procedures with a condition of a patient like Suzanne but he was at all times defending himself to a point where he lost his temper and Dato' Fazir had to calm him down and manage the rest of the discussion.

23. Q: Did Dr Sivalingam and the medical officer express sympathy and empathy?

A: No, they did not. On the contrary, Dr Sivalingam said to all the family members present at the conference that if given a chance to do it all over, he would do everything the same way. He was so defiant even after it was proven that the diagnosis of septic arthritis given by Tropicana Medical Centre was correct. The independent expert report by Prof YK Chan had established that the cause of Suzanne's death came from the mismanagement and professional misconduct of Dr Sivalingam and his team in the Orthopaedic ward.

24. Q: How did you and family members feel after hearing Dr Sivalingam's explanation?

A: I felt that Dr Sivalingam's statement was an insult to the terrible condition that he left my wife in. The statement by him displayed arrogance in him. I feel that Dr Sivalingam knew that he was wrong in the way he handled Suzanne's case but because of his huge ego, he refused to admit. I was devasted by Mr Sivalingam's behaviour and his insistence that he was not at fault for the condition in which my wife had fallen into namely in a comatose state after suffering a massive stroke, shortly after which she died. This is the same feeling that of my son and my daughter who were present in the conference.

[86] PW2's statement as to what transpired during the meeting at HKL corroborates PW1's version of events:

48. Q: Did you and the family members take up your grievances with KLH?

A: Yes, we did. A meeting was arranged for between myself and other family members as well as several members of the Department of Orthopedics, particularly those involved in the care of my mother-in-law's case which included the Head of Department of Orthopedics, Mr. Fazir, the treating specialist, Mr. Sivalingam, and an accompanying Medical Officer.

49. Q: What was KLH hospital's response to your grievances?

A: At this meeting, our grievances regarding the careless management of my mother-in-law's case were put forward in detail by my father in law, my wife and I. We were met with an unrepentant and arrogant Mr. Sivalingam who justified his course of treatment as appropriate and right.

When it was pointed out that there was enough evidence on presentation at the emergency department, with regards to clinical findings and results of blood investigations, to point to a diagnosis of septic arthritis, he claimed that he could not trust blood investigations taken by a 'Private Medical Centre' and based his treatment plan on those results. He concluded his arrogant rant by stating that, given the chance to do things over again, he would do the same thing all over again.

The meeting ended with my father-in-law speaking up to say that he had heard enough and was clear on the negligence that led to my mother-in-law's state. He reserved his right to file a law suit and we walked out of the meeting.

[87] The plaintiff's counsels submitted that the second defendant's statement reeked of arrogance and displayed a total lack of compassion, respect, remorse, sympathy and empathy. Instead of showing humility and admitting the truth, the second defendant uttered words to the effect that if the events had happened again with another patient, he would not do anything different. This strikes me as being akin to the Malay proverb *Menegakkan benang yang basah*.

[88] This court takes a most serious view of the second defendant's words and conduct which are disturbing, appalling and an insult to his profession and to the plaintiff and his family. It must have been painfully cruel for the plaintiff and his family members who attended the meeting to hear such utterance from

a professional medical doctor. There can be no clearer illustration of insulting conduct which justifies an award for aggravated damages.

[89] Furthermore, as submitted by Mr Manmohan and Mr Karthi Kanthabalan, taking into consideration the deceased's illustrious public service record, the treatment and want of appropriate care to a former senior colleague was disgraceful. It is disconcerting to think that if senior doctors could be so unprofessional and reckless in their treatment of a senior doctor and a former employee and colleague of the defendants, what standard can be expected from them towards thousands of ordinary patients at KLH. However, this could well be an isolated incident and this court remains optimistic that most, if not all, in the medical profession remain true to the Hippocratic Oath.

(viii) PW2's clinical involvement in the deceased's treatment

[90] PW2's forced involvement began from around noon on 21 December 2014 and is set out in detail in the answer to question 6 in PW2's witness statement. Basically, PW2 had taken action to commence IV fluids; make referral to the acute pain service; provide immediate resuscitative measures; make decisions on airway support; and make plans for surgery under anesthesia.

[91] Learned SFC in her cross examination of PW2 sought to show the existence of a protocol that family members are not supposed to treat an immediate family member who is admitted into hospital. In re-examination, PW2 sought to explain what prompted him to take control of the situation. This is what he said:

> As a family member, it is not advised or appropriate for me to be her primary treating physician. And rightfully so, she was referred to 2 orthopedics medical departments which is in Tropicana and in HKL. But it is my duty, as a person and as a medical practitioner to, when I discover a person in distress of any kind anywhere, whether they are related to me or not, that I provide them with the resuscitative care necessary to sustain their life and to get them better. So I could not have stood by when there was no other doctors around when my mother-in-law was discovered in that state and do nothing and wait for help to arrive that never came until about 3pm or 4pm that day.

[92] As the deceased's son-in-law and a medical doctor by training, it is only natural for him to be concerned as to the deceased's health and treatment plan upon admission at KLH. On the next day, PW2's actions were necessitated by the lackadaisical attitude of the doctors and nurses in the ward in relation to the deceased's deteriorating condition. It is completely understandable for PW2 to undertake the measures that he did in order to provide much needed treatment for the deceased, albeit it was too late to save her. In light of the defendants' own

inaction and tardiness, it is reprehensible for them to turn around and accuse PW2 of unwarranted interference. No reasonable person trained in medicine would just wait and do nothing under the circumstances. The defendant's accusations against PW2 has done nothing but fortified the plaintiff's case for aggravated damages.

(ix) Blemished entries in the medical records

[93] PW2 had given a detailed account regarding the retrospective entries made by the defendants in the deceased's medical records in their futile attempt to 'cover the tracks' of their wrongdoings. The relevant part in PW2's witness statement starts from Question 34–Question 41. Apart from the entry regarding tramadol as mentioned earlier in this judgment, the diagnosis of septic arthritis; the deceased informing the second defendant that she had walked 1.5km in a shopping mall a few days before the hospitalisation; the deceased had slept well on the first night of admission; the deceased was alert, conscious and comfortable; and scribblings to give the impression that septic arthritis was being considered as a diagnosis and the possibility of a stroke was being deliberated were all inserted without any initials and dates and as late entries.

[94] At the trial, learned SFC had produced the original medical records and as such, the examination-in-chief was conducted in a manner which enabled the court to see each 'squeezed in entry', scribbling or notation as described in PW2's witness statement in the original document itself. To the question by the SFC that it is a practice for retrospective notes to be made in medical records because not everything can be written at the material time when a patient is undergoing treatment, PW2 insisted that there is a standard operating procedure ('SOP') or one correct style. This SOP was explained in PW2's answer to Question 35 in the following words:

> A retrospective documentation can be made on a fresh sheet of paper, making reference to the incident in question.
>
> A retrospective addition or omission of fact from the notes can also be made with the initials of the doctor signed above the correction made and the date and time of correction specified.

[95] The defendants, in not calling any of the makers of the alleged late entries, have chosen not to challenge or provide any explanation on the same. Under the circumstances, this court finds that there is credible evidence in support of the plaintiff's contentions in respect of the embellishment of the deceased's medical records post-event. Such despicable conduct enhances the plaintiff's case for aggravated damages to be awarded.

(x) Misuse of in-house experts and the *Bolam* test

[96] The plaintiff invited the court to refer to two independent expert medical reports which had been prepared by Professor Chan Yoo Kuen, Department of Anaesthesiology, Faculty of Medicine, University of Malaya dated 12 September 2015 and Dr KS Dhillon, Consultant Orthopaedic Surgeon, KPJ Selangor dated 23 September 2015.

[97] After a detailed discussion of the facts and issues, Professor Chan concluded in her report, inter alia, that:

> 33. All the care providers in the management of Dr Suzanne had failed her. The orthopaedic team failed to recognize the consequences of sepsis in a diabetic patient. They were extremely slow (a delay of 24 hours) to understand the gravity of confirming the diagnosis and putting the correct antibiotics to manage the high risk emergency situation the patient was in. She was already in a hyperglycemic crisis and this was also not recognized by the orthopaedic team before the anaesthesiology team took over the care.
>
> 34. Although the anaesthesiology/ICU team recognized at the time of admission that the patient had diabetic ketoacidoisis with the septic arthritis, they failed to resuscitate her microcirculation appropriately with proper fluid management and allowed her to remain hypoxic in the tissues by allowing her to experience further dehydration with their fluid management.
>
> 35. In addition they failed to recognize the consequences of their overzealous ventilation which worsened the microcirculation and did not improve the tissue hypoxia.
>
> 36. The cerebellar and pontine infarct are the collective results her failed microcirculation leading to the tissue hypoxia — from the sepsis secondary to the septic arthritis in her right ankle, from dehydration secondary to poor fluid management and from severe vasoconstriction secondary to excessively high ventilator volumes.
>
> 37. Cerebral protection should have been afforded from day 1 after admission into the intensive care by ensuring that the carbon dioxide level was not excessively low as happened in this case — the decreased blood flow to the brain contributed to the tissue hypoxia which resulted in the infarcts in various areas of the brain.
>
> 38. Hyperglycemic crisis occurring in a diabetic patient is rare but it should not absolve any well trained acute care provider from managing these patients adequately. They should have solicited the care of an endocrinologist if they have doubts about the symptoms and signs, the fluids and insulin management and the metabolic abnormality that ensue from the condition. The providers showed that they were managing the patient's problems piecemeal without recognizing the whole picture of what the patient's problems were due to. The efforts in care did not match what the patient needed to survive. They were making gross errors (with fluids and ventilation) which ultimately cost the patient her life.
>
> *I realise that in writing this report, my duties are to the Court. The issues and conclusions*

have been done with compliance of that duty taken into consideration. (Emphasis added.)

[98] Dr KS Dhillon made a similar finding in the final paragraphs of his report namely:

> The cause of death was reported as cerebellar and pontine infarcts. The cause of death was most likely due to septic shock ...
>
> This patient was at a high risk of developing severe sepsis and septic shock, considering her age and multiple medical illnesses. The patient also had streptococcus pneumoniae bacteremia (positive culture) which is one of the common causes for severe sepsis and septic shock.
>
> Only a prompt diagnosis on the day of admission and prompt initiation of broad spectrum IV antibiotics and better surveillance and monitoring of the patient would have prevented severe sepsis and septic shock from setting in. There is absolutely no role of a guarded approach of waiting for fever (which may never occur in the elderly with sepsis) and withholding antibiotics till sepsis is confirmed. Nothing will go wrong if a patient with osteoarthritis of the ankle is treated for septic arthritis. However, treating a patient with septic arthritis for osteoarthritis can have disastrous consequences
>
> Management of this patient on admission at Hospital Kuala Lumpur on 20/12/14 and on the following day on 21/12/14 fails, in my opinion, to meet the minimum standard of care required in management of an elderly patient who is referred by an orthopaedic surgeon for suspected septic arthritis of the ankle.

[99] On the other hand, the plaintiff submitted that the reports prepared by Dr Lim Wee Leong, Head and Consultant Anaesthesiologist, Department of Anaesthesia and Intensive Care, Sungai Buloh Hospital dated 7 September 2017 and Dr Mohammad Anwar Hau Abdullah, *Pakar Perunding Kanan Ortopedik*, Hospital Raja Perempuan Zainab II, Kota Bharu (undated) were clearly biased in favour of the first defendant as their employer, and the other defendants as their colleagues. With their vast resources, the plaintiff contended that the defendants should have obtained opinions from truly independent experts who have a higher duty to assist the court in the cause of justice in accordance with the provisions of O 40A r 2 of the RoC.

[100] Moreover, it is the plaintiff's submission that as regards diagnosis and treatment, the courts in Malaysia (see *Dr Hari Krishnan*'s case and *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605) have followed the *Bolam* test subject to the *Bolitho* qualification (as laid down in *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771) which provides that the court must see that the expert opinion is reasonable, responsible and respectable and stands up to a logical analysis.

[101] The *Bolam* test is encapsulated in the direction given by Justice McNair to the jury in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at p 121 in the following words:

> ... But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. ... Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at that time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent ...

[102] By getting the two in-house experts to conclude that there was no negligence, The plaintiff's contention is that the defendants were attempting to persuade this court that the defendants had somehow passed the *Bolam* test. The plaintiff would then have to show that the defendants' experts' opinions were not reasonable, responsible and respectable and did not stand up to a logical analysis. Simply put, the defendants were endeavouring to misuse the *Bolam* test.

[103] This court, having read all four reports, is of the view that there is merit in the plaintiff's arguments. A responsible expert who understands his duties and obligations under the law would gather all the facts, consider the versions of both sides, address all issues which arise for determination and provide an objective and truly independent report uninfluenced by the surrounding pressures of the disputing litigants.

[104] The two reports submitted by the defendants' experts were notably silent on the late and inaccurate entries in the deceased's medical records and were skewed towards only one conclusion, which is to absolve the defendants from any liability whatsoever. The reality is that the defendants have admitted liability on the first date fixed for trial. It would thus appear that the defendants' experts were merely in-house experts who were beholden to the first defendant and owed allegiance to the other defendants.

[105] In two out of the four cases relied upon by the plaintiff on this issue (namely, *Muhammad Yassien b in Zuliskandar (seorang kanak-kanak yang mendakwa melalui bapanya dan sahabat wakilnya Zuliskandar bin Md Pechor) & Ors v Kerajaan Malaysia* [2010] MLJU 2163 and *Hariesh Kumar a/l*

Muthragi lwn Kerajaan Malaysia dan lain-lain [2011] MLJU 1533), reference is made to the *Guideline Of The Malaysian Medical Council 002/006: Medical Records And Medical Reports* where under para 3 on *Second And Expert Opinion*, it is stated that 'A practitioner involved in the management of the patient or working in the same healthcare facility or Ministry as the doctor in the inquiry, should not appear as expert witness in such inquiry'. In accepting the assignment to prepare the reports, the defendants' experts had acted contrary to the said guideline.

[106] I conclude that the intangible injury to the plaintiff has been exacerbated by this factor as well.

[107] Consequent to my findings that aggravating factors have been proven by the plaintiff, I now turn to the amount to be awarded for aggravated damages which would be fair compensation for the injury suffered in this case. In this regard, the guidance by the Court of Appeal in *Thompson v Commissioner of Police of the Metropolis* [1997] 2 All ER 762 at pp 774–776 is instructive. Closer to home, the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, had cited Lord Woolf's observation as follows:

> [40] ... In *Thompson v Commissioner of Police of Metropolis* [1997] 2 All ER 782, Lord Woolf observed:
>
> > ... We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravate damages because the circumstances will vary from case to case. In the ordinary way, however, we should not expect the aggravated damages to be as such as twice the basic except perhaps where, on the particular facts, the basic damage are modest.
>
> [41] In the same vein, the Singapore Court of Appeal in *Koh Sin Chong Freddie v Chan Cheng Wah Enterprise* [2012] 4 SLR 129 stated at p 652:
>
> > ... we are nonetheless of the view that there should be some semblance of proportionality between the quantum of damages and aggravated damages awarded ...'; and
>
> > ... Aggravated damages are meant to compensate for the aggravation of the injury; they are not an arbitrary top-up unrelated to the desire of the court to compensate the plaintiff for the aggravation.

[108] I further note that thus far, the sampling of reported cases where aggravated damages have been awarded fall under the realm of the tort of trespass and conversion and detinue (*Sambaga Valli*: RM300,000 awarded), sexual harassment (*Mohd Ridzwan bin Abdul Razak v Asmah Bt Hj Mohd Noor* [2016] 4 MLJ 282: RM20,000 awarded); assault by servant in the course of employment (*Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001]

6 MLJ 497: RM10,000 awarded); assault during orientation programme for new officers (*Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337: RM50,000 awarded); unlawful arrest and detention by the police (*YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors* [2016] 6 MLJ 352: RM150,000 awarded as aggravated and exemplary damages); and defamation (*Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal* [2017] 1 MLJ 500; [2016] 1 LNS 1160: RM50,000 awarded).

[109] In so far as medical negligence cases are concerned, aggravated damages have been awarded in only two cases which are:

(a) *Dr Hari Krishnan* where RM1m was awarded by the High Court for permanent blindness of the plaintiff's right eye due to the negligence of the defendants. The Court of Appeal took into account the plaintiff's severe pain, loss of vision, nervous shock and distress, embarrassment and humiliation, deprivation of ordinary life experience, and lost of promotion prospects and saw no reason to disturb the award. The Federal Court dismissed the doctors' appeal on quantum; and

(b) *Nur Syarafina* where the High Court awarded RM200,000 for the defendants' failure to disclose the plaintiff's medical records which the court found was exacerbated by the defendants' conduct in deliberately ignoring the advice given by the court to government hospitals and physicians in *Nurul Husna*'s case; deliberately suppressing the findings of an internal inquiry report by refusing to disclose the said report and instead filing a defence; and deliberately refusing and/or failing to comply with the terms of the consent judgment entered for the medical records to be disclosed.

[110] In determining an amount that would be fair and reasonable in the circumstances of this case and based on the evidence adduced, I had considered the act and motive of the defendants; the plaintiff's status, position and character; the purpose of aggravated damages which is not to punish the defendants but to serve to compensate the plaintiff for injuries affecting feelings arising out of the tortious acts of the defendants; and an appropriate global sum for general damages commensurate with the injury sustained.

[111] I am unable to agree with the plaintiff that the aggravating factors in the plaintiff's case are more severe than those in *Dr Hari Krishnan.* The plaintiff in *Dr Hari Krishnan* lost his eyesight in one eye; a disablement which the plaintiff has to live with throughout his lifetime. However, the contumelious conduct in the present case is definitely more serious and offensive as compared to *Nur Syarafina.*

[112] Accordingly, the court made an award in the sum of RM500,000 for aggravated damages.

C. Costs

(i) Costs of the liability and quantum proceedings

[113] Learned counsels for the plaintiff made extensive submissions in moving this court to make an order of RM110,000 as costs of the liability proceedings and RM150,000 for the quantum proceedings. 13 reported judgments and articles, not including cases relied upon in relation to other points of submissions and sealed allocaturs in previously litigated cases, were placed in the bundle of authorities for my consideration.

[114] In contrast, learned SFC bare submission was that a sum of RM10,000 was offered as party to party cost.

[115] I shall begin by addressing para 98 of the written submission by the plaintiff's counsels which states that there was a very late admission of liability and as a result some trial dates were vacated. The notes of proceedings show that the first hearing dates were fixed for 5–7 September 2017 but the hearing was postponed upon an application by the learned SFC. The next hearing dates were 13 and 15 November 2017 and 4–6 December 2017. However, the court had older cases to hear on those dates and so new trial dates were set for 5–6 April 2018. To sum up, some trial dates were indeed vacated, namely in September, November and December 2017.

[116] Next, I take cognisance of the arguments put forth by the plaintiff that:

(a) medical negligence litigation is difficult, complex, time-consuming and often involves novel questions of law and fact;

(b) such litigation is also very expensive and legal costs can be considerable compared to the value of the claim;

(c) only a fraction of lawyers undertake medico-legal work and even fewer have the requisite skills and knowledge to undertake medical negligence litigation;

(d) in England and Wales, litigants have advantages in the form of conditional fee agreements; access to legal and litigation funding as well as medical records even before commencement of action; greater access to medical experts and lawyers specialising in medical negligence; and before the event and after the event insurance cover or litigation costs;

(e) despite the advantages as aforesaid, the *Woolf Commission on Access to Justice — Final Report, Section IV: Special Areas, Chapter 15: Medical*

Negligence had singled out medical negligence litigation for special mention due to the analysis of costs conducted which show that the disproportion between costs and damages is greater in medical negligence litigation than in other areas of litigation; delays in medical negligence litigation are generally longer than delays in other forms of civil litigation; medical negligence litigation has a higher failure rate than other personal injury litigation; meritorious claims are often defended for a surprisingly long time; and suspicion between the parties and the lack of co-operation is frequently greater than in other areas in litigation; and

(f) case precedents illustrate the range of costs that have been awarded, for example:

(i) in *Lee Yaw Long v Dr Ganapathi Pillai and Ors* (Civil Suit No 22–299 of 2003) (unreported), Kuala Lumpur High Court, the sum of RM400,000 was taxed as getting-up fee against two defendant doctors and a hospital where the defendants admitted liability on the first day of trial;

(ii) in *Positive Well Marketing Sdn Bhd v OKA Concrete Industries Sdn Bhd* [2014] 10 MLJ 385; [2013] 7 CLJ 1083, getting-up of RM250,000 for an intellectual property dispute that took two days to complete was upheld;

(iii) in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors* [2013] 10 MLJ 805, the High Court awarded the getting-up fee to the successful defendants in a construction dispute for the sum of RM150,000 each;

(iv) in *Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram* [2009] 2 MLJ 473, the costs of a failed summons in chambers to set aside an ex parte order allowing the lodgment of a private caveat was taxed at RM250,000;

(v) in cases involving brain-damaged infants and the Government of Malaysia such as *Thivya Ruban s/o Thyagarajan v Government of Malaysia* (Suit No 21–170 of 2005) (unreported) and *Muhamad Haziq Amsyar & Anor v The Government of Malaysia* (Civil Suit No M3-22–307 of 2003) (unreported), the sum of RM100,000 was awarded as getting-up fee for the liability proceedings although the matter did not proceed to trial. In *Thivya Ruban*, RM100,000 was awarded as the getting-up fee for the quantum proceedings;

(vi) in *Hariesh Kumar a/l Muthragi lwn Kerajaan Malaysia dan lain-lain* [2011] MLJU 1533, RM120,000 was awarded as getting-up fee for the assessment of damages proceedings before a Deputy Registrar in a brain-damaged infant case which took five days to complete while in

Nurul Husna's case, RM200,000 was awarded where only the trial on quantum was held over six days; and

(vii) in *Sheela Christina Nair d/o Mariadass v Regency Specialist Hospital Sdn Bhd & Ors* [2016] 9 CLJ 267, only a trial on quantum was held and a getting-up fee in the sum of RM120,000 was awarded with an out-of-pocket expenses incurred in the region of RM14,747.63.

[117] As at the date of the first written submissions in June 2018, the plaintiff's solicitors have been involved in 29 reported medico-legal cases. In the conduct of the case before this court, the plaintiff was represented by one senior counsel and assisted by one junior counsel. Consultant orthopedic surgeon, Dr Kuldip Singh Dhillon and consultant anesthetist, Professor Chan Yoo Kuen had provided expert support for the plaintiff's case. The relevant witnesses' statements of the lay witnesses of fact had been prepared and filed in court together with the expert reports. I have no doubt whatsoever that the plaintiff's solicitors have done the needful and were fully prepared for trial. The authorities submitted to the court were illuminating and provide a broad guideline in so far as the award of costs is concerned. Ultimately, each case has to be decided based on its facts and differentiating factors.

[118] This court does not deny that endless hours of preparatory work had been invested in the anticipation of a full trial on both liability and quantum. Nevertheless, the fact remains that upon the defendants' admission of liability, only a trial on assessment of damages had to be conducted and this took merely three hours in total. Overall, it is my opinion that RM260,000 claimed as the total amount of costs is excessive. After weighing all the factors as put forth by learned counsels for the plaintiff, I conclude that a sum of RM100,000 is a befitting order to be made for costs.

(ii) Out-of-pocket expenses

[119] I had directed that the amount of RM20,203.60 based on the breakdown as shown in items 3.1–3.9 in Annexure 2 of the written submission by learned counsels for the plaintiff be referred to the Deputy Registrar for determination based on supporting documentary evidence.

[120] Costs is subject to the payment of the allocator fee to be determined by the Deputy Registrar.

D. Interest

[121] Although this was a non-contentious issue, Mr Manmohan and Mr Karthi Kanthabalan did not leave anything to chance and submitted several authorities on pre and post judgment interest (among others s 11 of the CLA

1956; O 42 r 12 of the RoC; *Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30; *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276; and *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156) to convince this court to make an order as to interest as suggested.

[122] Interest on the various heads of damages as prayed by the plaintiff is in accordance with the legal principles and is thus awarded as follows:

(a) interest on special damages at the rate of 4%pa from the date of the incident (20 December 2014) up to the date of judgment on liability (5 April 2018);

(b) interest on general damages and aggravated damages at the rate of 8%pa from the date of service of the writ (3 June 2016) until the date of judgment on liability (5 April 2018); and

(c) interest on the judgment sum including costs at the rate of 5%pa from the date of judgment on liability (5 April 2018) to the date of payment.

Order accordingly.

Reported by Ashok Kumar